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# Decision

**Matter of:** Truetechn, Inc.

**File:** B-402536.2

**Date:** June 2, 2010

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Victor Kubli, Esq., Kubli & Associates, PC, for the protester.

Sean P. Bamford, Esq., K&L Gates, LLP, for the intervenor.

Vera Meza, Esq., and Russell Bottom, Esq., Department of the Army, Army Materiel Command, for the agency.

Cherie J. Owen, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest of an agency's evaluation of the awardee's past performance is denied where the agency also determined, contemporaneous with its award decision, that the protester's proposal would not be selected for award even if the awardee's proposal received a neutral past performance rating, and where there is no basis in the record to conclude that the agency's judgment is unreasonable or not in accord with the solicitation requirements.

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## DECISION

Truetechn, Inc., of Riverhead, New York, protests the award of a contract to NanoScale Materials, Inc., of Manhattan, Kansas, by the Department of the Army, Army Materiel Command under request for proposals (RFP) No. W52H09-09-R-0239 for M295 decontamination kits. Truetechn contends that the Army improperly evaluated the awardee's past performance, resulting in an unreasonable award decision.

We deny the protest.

## BACKGROUND

The Army issued the RFP on July 16, 2009 as a total small business set-aside. The RFP sought M295 decontamination kits, which consist of four pocket-sized packets, each containing an individual wipe-down mitt, comprised of A200-SiC-1005S decontaminant sorbent powder (A200) with a pad and backing material. When in use, the mitt is designed to allow decontaminant powder to flow through the pad to

absorb, neutralize, and remove contamination from life-threatening chemical and biological agents. Agency Report (AR), Tab I, Contracting Officer's (CO) Statement, at 2.

The RFP anticipated award of a fixed-price 5-year indefinite-delivery/indefinite-quantity (ID/IQ) contract. The RFP stated that offers would be evaluated on the basis of three evaluation factors: technical, past performance, and price. AR, Tab 4, RFP, at 53. The technical factor would be evaluated first, on a "go/no-go" basis. For this factor, offerors were required to provide sufficient evidence to demonstrate their ability to perform 15 discrete tasks necessary in the production of the decontaminant sorbent powder. Id. Only offers found technically acceptable would be further evaluated for award. Id.

With regard to past performance, the RFP instructed offerors to submit contract references representing recent, relevant performance under government and/or commercial contracts. Id. at 48. The solicitation defined "relevant" performance as performance that demonstrates the offeror has successfully manufactured or provided either the M295 Decontamination Kit or M100 Sorbent Decontamination System, or other kits containing similar items. Id. The RFP stated that the agency would evaluate offerors' past performance and assign the following ratings:

<b>Rating</b>	<b>Definition</b>
Very Low Risk	Very little doubt exists that the offeror will successfully perform the required effort.
Low Risk	Little doubt exists that the offeror will successfully perform the required effort.
Moderate Risk	Some doubt exists that the offeror will successfully perform the required effort.
High Risk	Significant doubt exists that the offeror will successfully perform the required effort.
Unknown Risk	The offeror had little or no recent/relevant past performance upon which to base a meaningful performance risk prediction.

Id. at 54. Award was to be made to the offeror whose proposal was found to represent the best value to the government based on vendors' past performance ratings and price, with past performance being more important than price. Id. at 53.

The agency received four proposals. The proposals submitted by the awardee and the protester were both found technically acceptable. The other two proposals received no-go technical ratings and were eliminated from the competition. The agency then evaluated the past performance of Trueteck and NanoScale.

With regard to Trueteck, the evaluation team found that the firm had successfully performed contracts under which it provided the same item being procured under this solicitation—the M295 Decontamination Kits and the A200 sorbent powder. AR,

Tab 12, Past Performance Evaluation of Truetechn, at 5-7. Therefore, the evaluation team assigned Truetechn a past performance rating of very low risk. Id. at 8.

With regard to NanoScale, the evaluation team found that, while the firm had not performed contracts requiring the production of M295 Decontamination Kits or A200 sorbent powder, it nevertheless had relevant experience because it had produced items similar to those being solicited. AR, Tab 13, Past Performance Evaluation of NanoScale, at 5-9. For example, the firm had produced wipes that matched the size, shape, and function of the wipes in the M295 Decontamination Kits, and the firm had produced reactive powders similar to the A200 sorbent powder. Id. Therefore, the evaluation team assigned NanoScale a past performance rating of low risk. Id. at 9.

The source selection authority (SSA) reviewed the findings of the evaluation team and adopted the team's past performance rating of Truetechn as very low risk, noting that Truetechn has manufactured and supplied M295 Decontamination Kits to the military since 1993. AR, Tab 10, Source Selection Decision, at 5-6. However, the SSA disagreed with the team's conclusion that NanoScale's past performance merited a rating of low risk. The SSA changed the rating from low risk to very low risk, noting that each of the firm's past performance references was considered to be relevant because they involved the production of items similar to the items contained in the M295 kits. In the source selection decision, the SSA stated that, while she believed that NanoScale's past performance met the definition of very low risk as set forth in the solicitation, she acknowledged that Truetechn, because of its history of providing the exact item solicited under this RFP, had a slightly lower performance risk than NanoScale. Id. at 7.

Truetechn's total evaluated price was \$33,896,677--12% more than NanoScale's total evaluated price of \$30,247,107. Id. In making the award decision, the SSA stated that, since both offerors had received the top rating for past performance, she did not believe that the slightly higher performance risk of NanoScale's proposal warranted the 12% price premium associated with Truetechn's proposal. Id. at 8.

In making the award decision, the SSA also conducted an alternative assessment to consider whether the result would change if NanoScale's past performance were deemed "not relevant" under the solicitation. Id. In her alternative assessment, the SSA noted that, under the definitions set forth in the solicitation, if NanoScale's past performance were deemed not relevant, then the firm would receive a past performance rating of unknown risk. Id. The SSA noted that, in this situation, Federal Acquisition Regulation § 15.305(a)(2)(iv) provides that an offeror without a record of relevant past performance may not be evaluated favorably or unfavorably on past performance. Id. The SSA performed an alternative best value trade-off decision and determined that if NanoScale had a neutral past performance rating, she would still select NanoScale for award because she did not believe the payment of a 12% (about \$3.6 million) price premium was warranted. Id. Therefore, even acknowledging that past performance was more important than price, the SSA

determined that the price premium associated with Truetechn's proposal was not justified by its higher past performance rating.

Thus, the SSA determined that whether NanoScale received a past performance rating of very low risk or unknown risk, its proposal represented the best value to the government. Id. The agency awarded the contract to NanoScale on February 11, and this protest followed.

## DISCUSSION

The protester challenges the agency's evaluation of NanoScale's past performance. Truetechn argues that because none of NanoScale's prior contracts involved the production or delivery of A200 sorbent powder or M295 decontamination kits, these contracts are not relevant. Protest at 12, 14; Comments at 11-12. Therefore, the protester contends that NanoScale should have been assigned a past performance rating of high risk or unknown risk. Protest at 12. The protester further contends that the SSA's alternative assessment based on a neutral rating should be given no weight because it is merely an attempt at "preemptive deployment" of *post hoc* rationales." Comments at 15.

As a preliminary matter, we need not resolve Truetechn's challenge to NanoScale's past performance rating of very low risk. As explained above, the SSA's alternative assessment establishes that she would have selected the proposal submitted by NanoScale, even assuming that all of NanoScale's past performance references were considered to be not relevant. In short, the record establishes that Truetechn was not prejudiced even were we to find that the Army unreasonably concluded that NanoScale's past performance references were relevant. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

With respect to Truetechn's challenge to the tradeoff decision, source selection officials in a negotiated procurement have broad discretion in determining the manner and extent to which they will make use of the technical and price evaluation results; price/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the test of rationality and consistency with the established evaluation factors. Creative Apparel Assocs., B-275139, Jan. 24, 1997, 97-1 CPD ¶ 65 at 6. Even where price is the least important evaluation factor, an agency may properly select a lower-priced, lower-rated proposal if it decides that the price premium involved in selecting a higher-rated, higher-priced proposal is not justified. Specific Sys., Ltd., B-292087.3, Feb. 20, 2004, 2004 CPD ¶ 119 at 5 (denying protest where agency awarded to lower-priced, lower-rated offeror, under an evaluation scheme where past performance was significantly more important than price); NAPA Supply of Grand Forks, Inc., B-280996.2, May 13, 1999, 99-1 CPD ¶ 94

at 5 (denying protest in which agency selected an offeror with acceptable past performance rating rather than offeror with exceptional past performance rating whose proposal involved a 2.4% price premium, where past performance was significantly more important than price).

Here, the SSA determined that, even if NanoScale received a neutral past performance rating,<sup>1</sup> its lower-priced proposal was most advantageous to the government, considering both past performance and price. In making this tradeoff decision, the SSA recognized the price differential between NanoScale's proposal and Truetech's higher-rated, higher-priced proposal. The SSA determined that, despite Truetech's past performance rating of very low risk, the price premium associated with Truetech's proposal was not justified given that the performance risk associated with NanoScale's proposal was acceptable. We think that this decision represents a reasonable exercise of the SSA's judgment, and we see no basis to question the SSA's selection of NanoScale's proposal as most advantageous to the government. See Gulf Copper Ship Repair, Inc., B-292431, Aug. 27, 2003, 2003 CPD ¶ 155 at 5; Hughes Georgia, Inc., B-272526, Oct. 21, 1996, 96-2 CPD ¶ 151 at 8.

Truetech challenges the SSA's alternative assessment, arguing that it is an attempt at "preemptive deployment" of *post hoc* rationales." Comments at 15; see Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15 (we accord greater weight to contemporaneous source selection materials rather than judgments made in response to protest contentions; we generally give less weight to reevaluations and judgments prepared in the heat of the adversarial process). This argument is unpersuasive.

The SSA's alternative assessment is contained in the source selection decision dated February 11—the day of the award, and therefore is a contemporaneous source selection document. It reflects the SSA's actual considerations at the time she made the award decision, and is not an argument formulated after-the-fact in response to protest contentions. In light of the SSA's contemporaneous alternative assessment based on a past performance rating of neutral for NanoScale, it is clear that Truetech was not prejudiced by the alleged improprieties in the agency's assignment of a very low risk rating to NanoScale. See West Coast Unlimited, B-281070.2, Aug. 18, 1999, 99-2 CPD ¶ 40 (protester was not prejudiced by allegedly improper determination

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<sup>1</sup> As noted above, Truetech initially asserted that NanoScale should have received a rating of either unknown risk or high risk. Protest at 12. Truetech offered no support for its contention that a high risk rating was warranted under the evaluation scheme here, and did not reassert this position in its comments on the agency report. There is no basis in the record to conclude that a high risk rating was warranted or to question the SSA's assumption that NanoScale would have received a neutral rating if its prior performance were not considered relevant.

that its proposal was unacceptable where record contained contemporaneous alternative assessment based on assumption that proposal was acceptable).

The protest is denied.

Lynn H. Gibson  
Acting General Counsel